SUPREME COURT OF THE UNITED STATES.

No. 146.—October Term, 1925.

Armin A. Schlesinger, Harry J. Schlesinger, and Myron T. MacLaren, Executors, etc., et al., Plaintiffs in Error, *vs.* The State of Wisconsin and County of Milwaukee.	In Error to the Supreme Court of the State of Wisconsin.

[March 1, 1926.]

Mr. Justice McReynolds delivered the opinion of the Court.

Section 1087-1, Chapter 64ff, of the Wisconsin Statutes 1919, provides—

> A tax shall be and is hereby imposed upon any transfer of property, real, personal, or mixed . . . to any person . . . within the State, in the following cases, except as hereinafter provided:
>
> (1) When the transfer is by will or by the intestate laws of this State from any person dying possessed of the property while a resident of the State.
>
> (3) When a transfer is by will or intestate law, of property within the State or within its jurisdiction and the decedent was a nonresident of the State at the time of his death.
>
> (3) When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this State, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. *Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution*

thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section.

These provisions were taken from § 1, c. 44, Laws of 1903, except that the last sentence of subdiv. 3 (italicized) was added by c. 613, Laws of 1913.

Section 1087 2, c. 64ff, imposes taxes upon transfers described by § 1087 1 varying from one to five per centum, according to relationship of the parties, when the value is not above twenty five thousand dollars. On larger ones the rates are from two to five times higher, with fifteen per centum as the maximum.

"Section 1087 5 [c. 64ff]. 1. All taxes imposed by this act shall be due and payable at the time of the transfer, except as hereinafter provided; and every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment."

Other provisions of c. 64ff provide for determination, assessment and collection of the tax. In the Revised Statutes of 1921 and 1925 c. 64ff became c. 72, and section numbers were changed—1087 1 became 72 01, 1087 2 became 72 02, 1087 5 became 72 05, etc.

In *Estate of Ehling* (1919), 169 Wis. 132, the court held: "Section 1087 1, Stats., as amended by c. 613, Laws 1913, which provides that gifts of a material part of a donor's estate, made within six years prior to his death, shall be construed to have been made in contemplation of death so far as transfer taxes are concerned, constitutes a legislative definition of what is a transfer in contemplation of death, and not a mere rule of law making the fact of such gifts *prima facie* evidence that they were made in contemplation of death."

Estate of Stephenson, 171 Wis. 462, 469. A gift of twenty three thousand dollars constitutes a material part of an estate valued at more than a million dollars; also, gifts by decedents in contemplation of death must be treated, for purposes of taxation, as part of their estates.

In re Uihlein's Will, Wis. [May 12, 1925] "As stated in the Schlesinger case, the statute was enacted for the purpose of enabling the taxing officials of the State to make an efficient and

practical administration of the inheritance tax law. . . . It is settled in this State that the tax attaches, not at the date of the transfer of the gift, but at the date of the death of the donor. . . . Under our decisions the gifts that have been made within six years of the donor's death, together with the amount of the estate left by the donor at the time of his death, constitute his estate, and must be administered, so far as inheritance tax proceedings are concerned, as one estate. The tax does not attach and become vested in the State until the death of the donor. When the gift is made and the donee receives it, there is no certainty that an inheritance tax will ever be levied upon the gift."

In the present cause the Milwaukee County Court found that Schlesinger died testate January 3, 1921, leaving a large estate; that within six years he had made four separate gifts, aggregating more than five million dollars, to his wife and three children; that none of these was really made in view, anticipation, expectation, apprehension or contemplation of death. And it held that because made within six years before death these gifts "are by the express terms of § 72.01 [formerly § 1087-1], Clause (3), of the statutes subject to inheritance taxes, although not in fact made in contemplation of death." An appropriate order so adjudged. The executors and children appealed; the Supreme Court affirmed the order (184 Wis. 1); and thereupon they brought the matter here.

Plaintiffs in error maintain that, as construed and applied below, the quoted tax provisions deprive them of property without due process of law, deny them the equal protection of the laws, and conflict with the Fourteenth Amendment.

The Supreme Court of the State said: "The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law." "Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death," [which means] "that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature." "In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death." "We agree with the applicants

that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered. We adhere to the ruling in the Ebeling case."

No question is made of the State's power to tax gifts actually made in anticipation of death, as though the property passed by will or descent; nor is there denial of the power of the State to tax gifts *inter vivos* when not arbitrarily exerted.

The challenged enactment plainly undertakes to raise a conclusive presumption that all material gifts within six years of death were made in anticipation of it and to lay a graduated inheritance tax upon them without regard to the actual intent. The presumption is declared to be conclusive and cannot be overcome by evidence. It is no mere *prima facie* presumption of fact.

The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be "wholly arbitrary." We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment. The legislative action here challenged is no less arbitrary. Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, they are subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character.

The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, "A" may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against "B".

Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.

No new doctrine was announced in *Stebbins* v. *Riley*, 268 U. S. 137, cited by defendant in error. A classification for purposes of taxation must rest on some reasonable distinction. A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid. *Mobile, etc., R. R.* v. *Turnipseed*, 219 U. S. 35, 43, discusses the doctrine of presumption.

The judgment of the court below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion.

Mr. Justice SANFORD concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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Mr. Justice Holmes, dissenting.

If the Fourteenth Amendment were now before us for the first time I should think that it ought to be construed more narrowly than it has been construed in the past. But even now it seems to me not too late to urge that in dealing with state legislation upon matters of substantive law we should avoid with great caution attempts to substitute our judgment for that of the body whose business it is in the first place, with regard to questions of domestic policy that fairly are open to debate.

The present seems to me one of those questions. I leave aside the broader issues that might be considered and take the statute as it is written, putting the tax on the ground of an absolute presumption that gifts of a material part of the donor's estate made within six years of his death were made in contemplation of death. If the time were six months instead of six years I hardly think that the power of the State to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. I think that our discussion should end if we admit what I certainly believe, that

reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in order to make effective a prohibition of the sale of beer. The power "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class." *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201, 204. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 283. In such cases, and they are familiar, the Fourteenth Amendment is invoked in vain. Later cases following the principle of *Purity Extract & Tonic Co.* v. *Lynch* are *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Pierce Oil Co.* v. *Hope*, 248 U. S. 498, 500. See further *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246.

I am not prepared to say that the legislature of Wisconsin, which is better able to judge than I am, might not believe, as the Supreme Court of the State confidently affirms, that by far the larger proportion of the gifts coming under the statute actually were made in contemplation of death. I am not prepared to say that if the legislature held that belief, it might not extend the tax to gifts made within six years of death in order to make sure that its policy of taxation should not be escaped. I think that with the States as with Congress when the means are not prohibited and are calculated to effect the object we ought not to inquire into the degree of the necessity for resorting to them. *James Everard's Breweries* v. *Day*, 265 U. S. 545, 559.

It may be worth noticing that the gifts of millions taxed in this case were made from about four years before the death to a little over one year, the last being after the donor had had an attack of angina pectoris, although he is said to have attributed his sufferings to a less serious cause. The statute is not called upon in its full force in order to justify this tax. If I thought it necessary I should ask myself whether it should not be construed as intending to get as near to six years as it constitutionally could, and whether it would be bad for a year and a month.

Mr. Justice BRANDEIS and Mr. Justice STONE concur in this opinion.